

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 ASIL LEON HUBLEY,)
7 Plaintiff,) No. CV-11-0299-CI
8 v.) ORDER DENYING PLAINTIFF'S
9 CAROLYN W. COLVIN, Acting) MOTION FOR SUMMARY JUDGMENT
Commissioner of Social) AND GRANTING DEFENDANT'S
10 Security,¹) MOTION FOR SUMMARY JUDGMENT
11 Defendant.)

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 13, 17.) Attorney Lora Lee Stover represents Asil L. Hubley (Plaintiff); Special Assistant United States Attorney Michael S. Howard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff protectively filed for Supplemental Security Income

¹ Carolyn W. Colvin became Acting Commissioner of Social Security on February 14, 2013. Under FED. R. CIV. P. 25 (d), Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 (SSI) on April 7, 2009.² Tr. 16. He alleged disability due to a
 2 broken right hand, deformed right hip, right knee, and right pelvis.
 3 Tr. 241. His claim was denied initially and on reconsideration.
 4 Plaintiff requested a hearing before an administrative law judge
 5 (ALJ), which was held on July 10, 2008, before ALJ R. J. Payne. Tr.
 6 44-94. Plaintiff, who was represented by counsel, and medical
 7 expert Arthur Lorber, M.D., testified. (*Id.*) The ALJ denied
 8 benefits on July 29, 2010, and the Appeals Council denied review.
 9 Tr. 16-30, 1-6. The instant matter is before this court pursuant to
 10 42 U.S.C. § 405(g).

11 **STANDARD OF REVIEW**

12 It is the role of the trier of fact, not this court, to resolve
 13 conflicts in evidence. *Richardson v. Perales*, 402 U.S. 389, 400
 14 (1971). If evidence supports more than one rational interpretation,
 15 the court may not substitute its judgment for that of the
 16 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999);
 17 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless,
 18 a decision supported by substantial evidence will still be set aside
 19 if the proper legal standards were not applied in weighing the
 20 evidence and making the decision. *Brawner v. Secretary of Health*
 21 and *Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If there is
 22 substantial evidence to support the administrative findings, or if
 23 there is conflicting evidence that will support a finding of either
 24 disability or non-disability, the finding of the Commissioner is

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 26 ² Plaintiff's prior application for SSI was filed on July 10,
 27 2008, and denied by initial determination on August 31, 2008.
 28 Plaintiff did not appeal that denial. Tr. 16, 107, 193.

1 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
2 1987).

3 **SEQUENTIAL EVALUATION PROCESS**

4 The Commissioner has established a five-step sequential
5 evaluation process for determining whether a person is disabled. 20
6 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S.
7 137, 140-42 (1987). In steps one through four, the burden of proof
8 rests upon the claimant to establish a *prima facie* case of
9 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
10 920, 921 (9th Cir. 1971). This burden is met once a claimant
11 establishes that a physical or mental medically determinable
12 impairment prevents him from engaging in his previous occupation.
13 20 C.F.R. §§ 404.1520(a), 416.920(a). At step five, the burden
14 shifts to the Commissioner to show that (1) the claimant can perform
15 other substantial gainful activity; and (2) a "significant number of
16 jobs exist in the national economy" which claimant can perform. 20
17 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722
18 F.2d 1496, 1498 (9th Cir. 1984).

19 **STATEMENT OF THE CASE**

20 The facts of the case are set forth in detail in the transcript
21 of proceedings and are briefly summarized here. At the time of the
22 hearing, Plaintiff was 29 years, married with ten children, nine of
23 which were living at home with him and his spouse. Tr. 29, 50. He
24 testified he had a 10th grade education and was working on his high
25 school equivalency degree by attending math classes at the community
26 college. Tr. 75-76. He reported past work experience as a laborer,
27 bookkeeper, and telemarketer between 1998 and 2000. Tr. 229.
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1 Plaintiff reported he was diagnosed with Blount's disease as a child
 2 and suffered from bone deformities that affected his ability to
 3 work. He testified he could not sustain work due to pain caused by
 4 his bone deformities. Tr. 78-79.

5 **ADMINISTRATIVE DECISION**

6 At step one, the ALJ found Plaintiff had not engaged in
 7 substantial gainful activity since April 7, 2009. Tr. 18. At step
 8 two, he found Plaintiff had the severe impairments of "fracture
 9 injuries to the right hand; Blount's disease; right knee torn
 10 lateral meniscus status post repair; obesity; and diminished
 11 internal rotation of right hip." Id. He found depression was not
 12 a medically determinable impairment. Id. At step three,
 13 considering the effects of obesity, he found Plaintiff's
 14 impairments, alone and in combination, did not meet or medically
 15 equal one of the listed impairments in 20 C.F.R., Appendix 1,
 16 Subpart P, Regulations No. 4 (Listings). Plaintiff's representative
 17 stipulated to a step five determination. Tr. 18-19, 93.

18 At step four, the ALJ found Plaintiff had the residual
 19 functional capacity (RFC) to perform sedentary work, and specified
 20 the following exertional and non-exertional limitations:

21 The claimant can stand/walk for one hour at a time and he
 22 can stand and walk for a combination of 4 hours total in
 23 an 8 hour workday. He can sit for a total of 8 hours in
 24 an 8 hour workday. The claimant can lift up to 10 pounds
 25 continuously, 20 pounds frequently, and 50 pounds
 26 occasionally. He can carry up to 10 pounds frequently and
 27 20 pounds occasionally. The claimant can use his upper
 28 extremities continuously to reaching in all directions,
 handle, finger, feel and push and pull. The claimant has
 no restrictions in his left lower extremity and he can
 occasionally use his right lower extremity to operate foot
 controls. He can climb ramps and stairs occasionally, but
 he can never climb ladder, ropes, or scaffolds. He cannot
 balance, crawl, or kneel, but he can occasionally stoop or

1 crouch. The claimant should avoid unprotected heights and
2 slippery wet surfaces. He can occasionally be around
3 mechanical moving parts and he can occasionally operate a
4 motor vehicle.

5 Tr. 20. In his step four findings, the ALJ discussed Plaintiff's
6 testimony and summarized the medical evidence in detail. He
7 concluded Plaintiff's subjective symptom complaints that were
8 inconsistent with the RFC above were not credible. Tr. 20-28. He
9 then found Plaintiff had no past relevant work and proceeded to step
10 five. Tr. 29.

11 At step five, the ALJ found transferability of job skills was
12 not an issue because Plaintiff had no past relevant work. He
13 applied the Commissioner's Medical-Vocational Guidelines (the
14 "Grids"),³ 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201.24,
15 to determine there are jobs in the national economy that Plaintiff
16 can perform. Tr. 29. He concluded Plaintiff had not been disabled,
17 as defined by the Social Security Act, since April 7, 2009. Tr. 30.

18 ISSUES

19 The question is whether the ALJ's decision is supported by

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21 ³ The Grids were adopted by the Social Security Administration
22 to improve the efficiency and uniformity of Social Security benefits
23 proceedings. *Desrosiers v. Secretary of Health and Human Serv's*,
24 846 F.2d 573, 577 (9th Cir. 1988). Their use was upheld as valid in
25 *Heckler v. Campbell*, 461 U.S. 458 (1983). The use of the Grids is
26 appropriate where "a claimant's functional limitations fall into a
27 standardized pattern accurately and completely described by the
28 Grids." *Tackett*, 180 F.3d at 1103 (citing *Desrosiers*, 846 F.2d at
577).

1 substantial evidence and free of legal error. Plaintiff asserts the
2 ALJ erred when he assessed Plaintiff's credibility and RFC, and when
3 he applied the Grids at step five. Specifically, he argues the ALJ
4 was required to consider vocational expert testimony at step five
5 regarding the effect of non-exertional limitations, including pain,
6 on his ability to perform sedentary work. ECF No. 14 at 10-11.
7 Defendant argues the ALJ's decision is supported by substantial
8 evidence and should be affirmed. ECF No. 18.

9 **DISCUSSION**

10 **A. Credibility**

11 Plaintiff argues his testimony is consistent with objective
12 medical evidence and is not compatible with an ability to sustain
13 work. He claims evidence of medical abnormalities and his self-
14 reported need to rest and pain symptoms, if given proper weight,
15 entitle him to benefits. ECF No. 14 at 9-10. However, in this
16 case, evidence of medical abnormalities and Plaintiff's subjective
17 complaints are not adequate to establish disability. As held by the
18 Ninth Circuit:

19 An ALJ cannot be required to believe every allegation of
20 disabling pain, or else disability benefits would be
available for the asking, a result plainly contrary to 42
21 U.S.C. § 423 (d)(5)(A). . . . This holds true even where
the claimant introduces medical evidence showing that he
22 has an ailment reasonably expected to produce some pain;
many medical conditions produce pain not severe enough to
preclude gainful employment.

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24 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1999). Further, in
25 assessing credibility, the ALJ does not need to totally reject or
26 accept a claimant's statements - based on consideration of all the
27 evidence in the record, the ALJ may find the claimants statements
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1 regarding limitations, symptoms, and pain credible "to a certain
 2 degree." SSR 96-7p. The record shows the ALJ's discounted
 3 Plaintiff's testimony and found him capable of sedentary work with
 4 limitations to address those symptoms found credible. The ALJ's
 5 credibility determination meets the legal standard for rejecting
 6 subjective complaints in these proceedings. *Benecke v. Barnhart*,
 7 379 F.3d 587, 592 (9th Cir. 2004).

8 When the ALJ finds a claimant's symptom allegations are not
 9 credible, if there is no affirmative evidence of malingering, the
 10 ALJ must provide "clear and convincing" reasons for rejecting the
 11 claimant's allegations. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
 12 1995); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). If the
 13 ALJ's credibility findings are supported by substantial evidence in
 14 the record, "the court may not engage in second-guessing." *Thomas*
 15 *v Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002); *Fair v. Bowen*, 885
 16 F.2d 597, 604 (9th Cir. 1999) ("Credibility determinations are the
 17 province of the ALJ."). Once the ALJ has found a claimant's
 18 medically determinable impairments could reasonably be expected to
 19 produce alleged symptoms, he must consider certain factors in
 20 determining credibility. Those factors include reported daily
 21 activities inconsistent with alleged complaints; inconsistencies
 22 between allegations and conduct; observations of physicians and
 23 third parties concerning the nature, severity, and effect of the
 24 alleged symptoms; and any unexplained failure to follow treatment
 25 recommendations. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.
 26 2008); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1040 (9th Cir. 2007);
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1 *Social Security Ruling (SSR)*⁴ 96-7p.

2 Here, it is undisputed there is no affirmative evidence of
 3 malingering. The ALJ properly summarized Plaintiff's written
 4 reports and hearing testimony and gave specific reasons for
 5 discounting Plaintiff's allegations. For example, he referenced
 6 Plaintiff's inconsistent statements and self-reported daily
 7 activities and found they reflected adversely on Plaintiff's
 8 credibility regarding the severity of his impairments. Tr. 28.
 9 This was a reasonable finding given the nature of Plaintiff's
 10 inconsistent statements. See, e.g., Tr. 51, 178, 300, 329, 361. He
 11 noted Plaintiff's reported ability to care of his nine children,
 12 observations by examining physicians of no muscle weakness, normal
 13 gait and a "tendency" to intoe, a gap in treatment notes, ability to
 14 walk when he had no vehicle, lack of objective evidence of
 15 arthritis, and reports by providers that he was a "vague historian."
 16 Tr. 22. These are proper factors to consider in assessing
 17 credibility. *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th
 18 Cir. 1997).

19 In addition, the ALJ referenced Plaintiff's report of various
 20 activities that are inconsistent with total disability, such as

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 22 ⁴ Social Security Rulings are issued to clarify the
 23 Commissioner's regulations and policy. They are not published in
 24 the federal register and do not have the force of law. However,
 25 under the case law, deference is given to the Commissioner's
 26 interpretation of the Regulations. *Ukolov v. Barnhart*, 420 F.3d
 27 1002 n.2 (9th Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3
 28 (9th Cir. 1991).

1 running, jogging, playing soccer with his children, riding a
2 stationary bike, performing a variety of household chores and
3 attending school. Tr. 28. These various self-reported physical and
4 mental activities are not consistent with Plaintiff's claim that
5 pain restricts him from sustaining work-related activities. See,
6 e.g., Tr. 83, 86, 88, 91, 264, 361-62.

7 The ALJ also found medical evidence did not support the degree
8 of limitation claimed by Plaintiff. Observations from medical
9 providers is properly considered in assessing credibility. *Burch v.*
10 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)(objective medical
11 evidence is a factor considered in credibility analysis); *Osenbrock*
12 v. *Apfel*, 240 F.3d 1157, 1165, 1166 (9th Cir. 2001)(evidence that
13 claimant's doctor released claimant to light work supports rejection
14 of severe symptom testimony). Specifically, the ALJ summarized
15 examinations by Plaintiff's treating orthopedic specialist that
16 revealed no condition that would cause total disability. Tr. 23.
17 As noted by the ALJ, even when Plaintiff was prescribed and wearing
18 a knee brace, the orthopedic surgeon found Plaintiff's knee was
19 relatively normal and questioned whether there was any clinical need
20 for it. Other than a repair to a meniscal tear, the specialist
21 found no treatment for the knee was necessary. Tr. 24-25, 388. The
22 ALJ properly gave this treating specialist's findings significant
23 weight, weight that supports the ALJ's credibility findings. 20
24 C.F.R. § 416.927(c)(5).

25 The ALJ's credibility findings are supported by the Plaintiff's
26 hearing testimony and the record in its entirety. The ALJ did not
27 err in discounting Plaintiff's allegations that pain, fatigue, and
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1 symptoms caused by his medical condition rendered him unable to
2 work. *Lingenfelter*, 504 F.3d at 1040.

3 **B. RFC Determination**

4 In disputing the ALJ's credibility findings, Plaintiff argues
5 the ALJ's RFC determination is erroneous because it does not take
6 into consideration his limited education, his alleged level of pain,
7 and alleged limitations caused by his hand injury. ECF No. 14 at
8 10. Plaintiff's argument the ALJ failed to consider his limited
9 education is without merit, as this is a vocational factor that was
10 properly considered at step five when the ALJ appropriately applied
11 the Grids. 20 C.F.R. § 416.960(c)(1). Regarding pain complaints,
12 as discussed above, the ALJ gave specific, legally sufficient
13 reasons for discounting Plaintiff's allegations of disabling pain.
14 The ALJ's findings are supported by the record and constitute a
15 rational interpretation of the evidence. As noted by the ALJ,
16 Plaintiff testified that his prescribed medication relieves his pain
17 and has no side effects that inhibit his ability to function during
18 the day. Tr. 28, 91. Further, Plaintiff testified that after he
19 injured his right hand in a carpet roller when he was 18 or 19, he
20 was able to return to work at the same job. Tr. 76-77. As found by
21 the ALJ, medical reports do not document hand deformities. Rather,
22 medical providers noted mild hand deformity, no atrophy and no
23 muscle weakness on examination. Tr. 27, 302-03, 361, 365-66.
24 Plaintiff's reported activities (playing some football, throwing
25 Frisbee with his children, and performing regular household chores)
26 are inconsistent with a claim of significant hand limitations. Tr.
27 85-91. The ALJ's RFC determination is supported by substantial
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1 evidence and is affirmed.

2 **C. The Grids**

3 Plaintiff argues application of the Grids at step five was not
4 appropriate. He asserts remand is necessary for payment of benefits
5 or additional proceedings to include vocational expert testimony.
6 ECF No. 14 at 11.

7 At step five, the burden shifts to the Commissioner to show the
8 claimant can perform other substantial gainful activity and a
9 "significant number of jobs exist in the national economy" which
10 claimant can perform. *Kail*, 722 F.2d at 1498. As noted above,
11 the Grids were adopted to improve the efficiency and uniformity of
12 these proceedings at step five. *Desrosiers*, 846 F.2d at 577.
13 Plaintiff argues that vocational expert testimony is required to
14 explain the effect his RFC has on his ability to perform sedentary
15 work and to identify jobs that he can perform. However, where a
16 claimant's non-exertional limitations would not significantly erode
17 an occupational base, application of the Grids is appropriate.
18 *Desrosiers*, 846 F.2d at 577 ("non-exertional limitations do not
19 automatically preclude applications of the grids").

20 Here, the ALJ determined Plaintiff was capable of performing a
21 modified level of sedentary work in that he could lift and carry
22 weight in excess of sedentary limits. Tr. 20. Sedentary work
23 generally involves lifting no more than 10 pounds at a time. The
24 ALJ found Plaintiff could lift up to 20 pounds frequently, 50 pounds
25 occasionally; therefore, Plaintiff's RFC can accommodate a broad
range of work at the sedentary exertional level. Tr. 20. In
addition, the non-exertional limitations listed in the final RFC

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1 determination are not activities performed in unskilled sedentary
2 work (i.e., climbing ladders, ropes, scaffolds, balancing, crawling,
3 or kneeling, etc.). For example, unskilled sedentary level jobs
4 involve work performed primarily in a seated position and involve
5 good use of the hands. *SSR 83-10*. Significantly, the ALJ found
6 Plaintiff still had good use of his hands, and Plaintiff cites no
7 medical evidence or medical provider's opinion to dispute this
8 finding. Tr. 27, 302-03; see ECF No. 14 at 10. Plaintiff's properly
9 discounted subjective complaints do not undermine the ALJ's
10 functional capacity assessment. *Bayliss v Barnhart*, 427 F.3d 1211,
11 1217 (9th Cir. 2005) (RFC assessment includes all limitations
12 supported by substantial evidence in the record that is not
13 dependent solely on a claimant's subjective complaints).

14 It is noted on independent review that the ALJ considered
15 whether vocational expert testimony was needed. Tr. 93. He
16 reasonably concluded the evidence in its entirety establishes that
17 Plaintiff's non-exertional limitations have very little effect on
18 the sedentary level occupational base. The ALJ decision that
19 vocational expert was not necessary in this case is supported by
20 substantial evidence. Tr. 30, 93. The ALJ's use of the Grids at
21 step five is appropriate; therefore, reversal is not required.
22 Accordingly,

23 **IT IS ORDERED:**

24 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
25 **DENIED**.

26 2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is
27 **GRANTED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant, and the file shall be **CLOSED**.

DATED April 18, 2013.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE